



SEP 12 1940

~~CHARLES ELMORE~~ CROPLEY  
CLERK

# In the Supreme Court of the United States

OCTOBER TERM, 1940.

**No. 354.**

RAY RITTER, *et al.*,  
*Petitioners,*

VS.

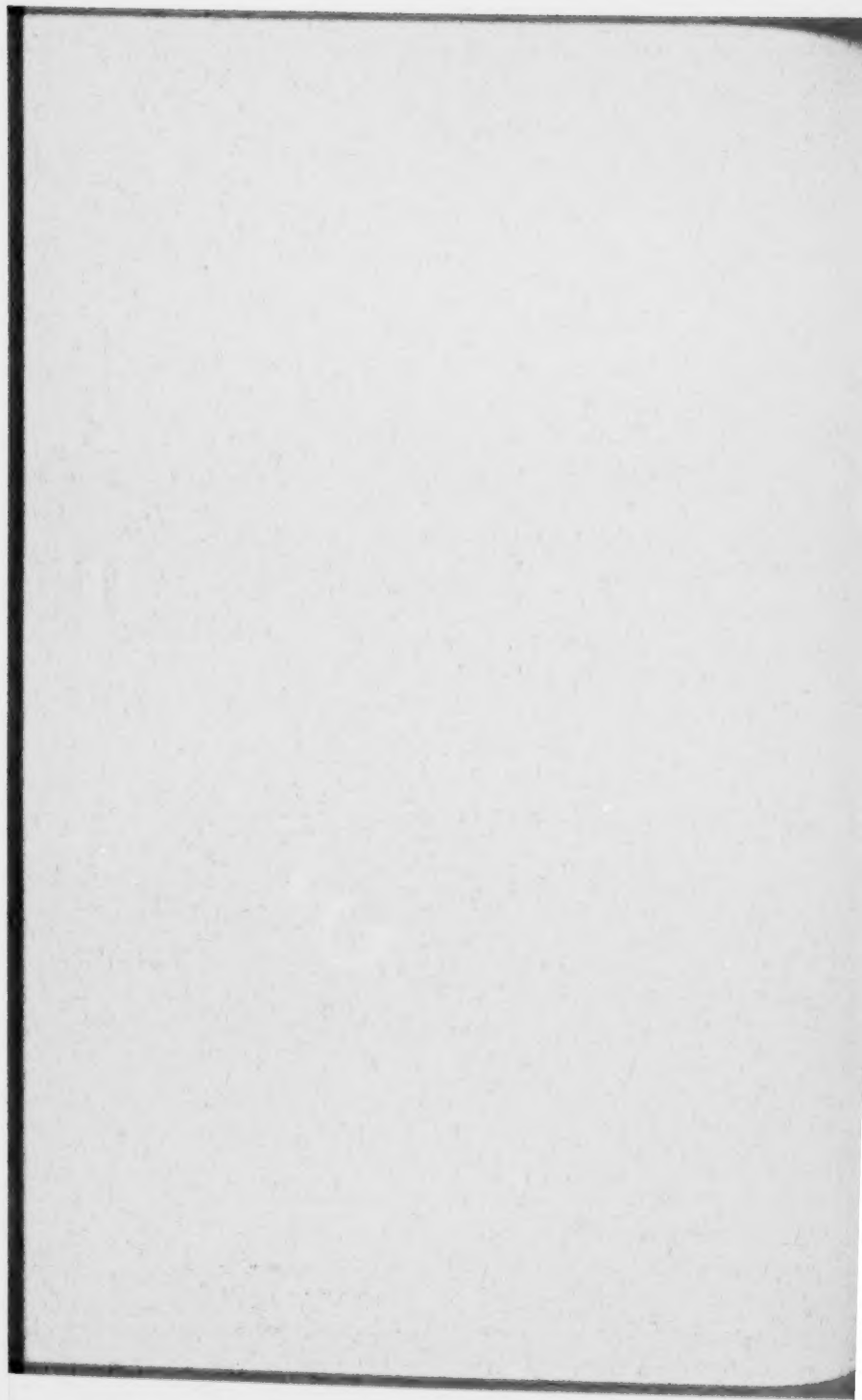
MILK AND ICE CREAM DRIVERS AND DAIRY  
EMPLOYEES' UNION, Local 336, *et al.*,  
*Respondents.*

---

**BRIEF OF RESPONDENT,  
MILK AND ICE CREAM DRIVERS AND DAIRY  
EMPLOYEES' UNION, LOCAL 336,  
IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.**

---

WILLIAM J. CORRIGAN,  
2025 N. B. C. Building, Cleveland, Ohio,  
*Attorney for Respondent, Milk and  
Ice Cream Drivers and Dairy Em-  
ployees' Union, Local 336.*



## INDEX.

---

Facts .....	2
Argument .....	8

### Authorities Cited.

---

<i>Belfi vs. United States</i> , (1919; C. C. A. 3d C.) 170 C. C. A. 662, 259 Fed. 882 (obiter).....	10
<i>Brannan vs. Ohio Poultry Producers' Co-operative Association</i> , 27 Ohio App., 426.....	18
<i>Earley vs. Co-operative Pure Milk Association, et al.</i> , 115 Ohio St., 185.....	18
<i>Finnegan vs. Butler</i> (1920) 112 Misc. 280, 182 N. Y. Supp. 671.....	11
<i>Goyette vs. C. V. Watson Co.</i> , (1923) 245 Mass. 577, 140 N. E. 285.....	10
<i>Hoban vs. Dempsey</i> (1914) 217 Mass. 166, L. R. A. 1915A, 1217, 104 N. E. 717, Ann. Cas. 1915C, 810	11
<i>Huebner-Toledo Breweries Co. vs. Zevnick</i> , 8 O. N. P. N. S. 193.....	20
<i>Kevil vs. Standard Oil Co.</i> , 8 O. N. P. 311, 11 O. D. N. P. 114.....	20
<i>Kissenger vs. Columbus Macadam Co.</i> , 8 O. N. P., 135	19
<i>Liberty Warehouse Co. vs. Burley Tobacco Co-operative Marketing Association</i> , 276 U. S. 96; 72 L. Ed., 483.....	18
<i>H. Lipman &amp; Sons, Inc. vs. Brotherhood of Painters, Decorators &amp; Paper Hangers of America</i> , 30 Abs., 435 .....	17
<i>List vs. Burley Tobacco Growers' Co-operative Assn.</i> , 114 Ohio St., 361.....	16
<i>Local Branch No. 248, et al. vs. Solt</i> , 8 O. App., 437....	9

<i>Metropolitan Co-operative Milk Producers' Bargaining Agency, Inc. vs. Rock Oil Co-operative, et al.</i> , 307 U. S., 563; 83 L. Ed. 1464.....	18
<i>Meyer vs. Journeymen Stonecutters' Asso.</i> (1890) 47 N. J. Eq. 519, 20 Atl. 492.....	11
<i>Polk vs. The Cleveland Railway Co.</i> , 20 O. App., 317	10
<i>Robey et al. vs. The Plain City Theatre Company</i> , 126 Ohio St., 473.....	16
<i>Scaggs vs. Transport Workers Union of America</i> ....	10
<i>Spangler vs. City of Cleveland</i> , 43 Ohio St., 526, 3 N. E., 365.....	20
<i>The Stark County Milk Producers' Assn. vs. Tabelaing, d.b.a. The Massillon Pure Milk Co.</i> , 129 Ohio St., 159 .....	16
<i>Wessell vs. Timberlake</i> , 95 O. S., 21.....	19
<hr/>	
27 Ohio Jurisprudence, page 162, Sec. 3.....	18
27 Ohio Jurisprudence, page 168, Sec. 9.....	18, 19
27 Ohio Jurisprudence, page 169, Sec. 10.....	19
27 Ohio Jurisprudence, page 172, Sec. 13.....	19
<i>Oakes' Organized Labor and Industrial Conflicts</i> , 237 (Closed Shop Agreements) para. 224.....	11
<i>Oakes' Organized Labor and Industrial Conflicts</i> , 237 (Closed Shop Agreements), para. 228.....	10

# In the Supreme Court of the United States

OCTOBER TERM, 1940.

---

No. 354.

---

RAY RITTER, *et al.*,  
*Petitioners,*

vs.

MILK AND ICE CREAM DRIVERS AND DAIRY  
EMPLOYEES' UNION, Local 336, *et al.*,  
*Respondents.*

---

**BRIEF OF RESPONDENT,  
MILK AND ICE CREAM DRIVERS AND DAIRY  
EMPLOYEES' UNION, LOCAL 336,  
IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.**

---

"A thoughtful consideration of all the facts and circumstances of this case compels the inescapable conclusion that the plaintiffs have not sustained their burden of proof. The inferences and conclusions drawn have the element of plausibility but fall short of establishing the probability of their claims.

"On the other hand, the claims of the defendants that this contract expresses the terms of settlement of a genuine labor dispute, adversarily negotiated and concluded, seem to be supported by the greater weight of the evidence."

Opinion of the Court of Appeals.

**F A C T S.**

It is the claim of the plaintiffs-appellants that the contract that was entered into between Local Union No. 336 and *some* of the dairies of Cleveland, Ohio, was for the purpose of carrying out restrictions in trade, preventing competition, controlling and maintaining the price at which milk was to be sold, and the creating of a monopoly in the marketing of milk.

We wish to call special notice to the fact that this contract, by its terms, expired on September 30, 1938, "unless written notice of a contrary intention was given by either party thirty days prior to September 30, 1938, or any year thereafter." Such notice was given by many of the contracting parties, and as a result their contracts expired September 30, 1938, and were not renewed.

Local No. 336 is a labor union composed of driver salesmen who deliver dairy products to stores and homes, and inside dairy workers who prepare the dairy products for delivery.

This union, as like organizations, is established to enable the workers through collective action to obtain and maintain fair hours, working conditions, and wages.

In 1922, the Milk Drivers' Union of Cleveland, Ohio, was wiped out of existence by a disastrous strike. From that date until 1933, a strong employers' organization prevented unionization among the workers.

In 1933, due to the enactment of the NIRA, a small, struggling, ineffective union made its appearance.

During 1933, and the early part of 1934, efforts were made to bring the union and various employers together for the purpose of working out a trade agreement. In line with these efforts, in the spring of 1934 the union sent a letter to each dairy requesting that a representative attend a meeting at the Hollenden Hotel, at which meeting reasons for unionization of the employees would be presented. About one hundred and twenty-five dealers attended the

meeting, and as a result, the employers selected a committee to meet with the union to determine if an agreement could be worked out that would serve as a standard for the industry. After a series of meetings which consumed several weeks' time, the two committees agreed on a contract. The dealers' committee recommended it to the industry as the best terms that could be agreed upon, and the union's committee likewise recommended it to the rank and file of the union.

The contract was then presented to each dealer separately, with the result that a number of dealers in the city accepted the contract and agreed to the terms thereof. The acceptance was made by each dealer individually. There was no collective acceptance of the contract. Like contracts were negotiated in 1935 and 1936. The contract negotiated in 1936, by its terms, expired September 30, 1937.

None of the contracts negotiated were satisfactory to the union, but were accepted as being the best bargain that could be obtained under the prevailing circumstances. The employers were at all times reluctant to enter into a contract, and did so only because they feared the growing influence of the union and the possibility that failure to contract would result in a strike.

The main and most difficult problem to be negotiated and settled in each contract was the question of wages, and from the union viewpoint this question of wages had been unsatisfactorily negotiated in each contract.

From the first meetings of the union committee and continuously throughout negotiations, the union presented a claim to wages based on an hourly or weekly rate. This method of paying wages the employers admitted applied to the inside workers, but resisted every attempt to apply it to the driver salesmen. The employers claimed that the driver salesmen were the means, and practically the only means, whereby the employer had contact with his cus-

tomers; that it was through the driver salesmen that the dairy products were sold; that the increase in business and retention of business depended principally upon the driver salesmen's efforts. They further argued, that the driver salesmen, in order to carry on their work properly, must have a definite incentive, and to supply this it was necessary that they be paid on a commission basis on the goods sold and collections made; that this method caused the driver salesmen to be on the lookout for new customers and thus expand the business of the dairy as well as increase their earnings; that securing their pay on the commission basis the drivers would be careful to give good service to the customers and thus retain good will for the dairy as well as receiving commission from each particular sale. The employers further argued that if daily, hourly or weekly wages were paid the drivers would become mere delivery men, and that the dairy consequently would suffer loss of business.

The union never succeeded in forcing the employers to recede from this position, and reluctantly each year the wage scale for the drivers was based on commission for goods sold and collections made.

During the three years that this method of payment was in effect the union constantly complained that it was a system by which they were defrauded and cheated. The union, in negotiating this wage contract, was endeavoring to establish a living wage, and a wage that would be proportionately the same for each driver salesman, the amount differing only as the number of customers served by each driver was greater or less.

But the union learned through experience that instead of fixing a uniform rate, they had assisted the employers in setting up a system whereby the driver salesmen were receiving for the same work as many rates of pay as there were dairies in the city. The reason for this variety of pay was due to the fact that the union, in ac-

cepting the commission method of pay, were under the impression that their commission would be paid on the price of milk which was general and established, such as eleven cents or twelve cents a quart. The dairies, instead of paying the driver on the established price of milk, paid commission based on the actual price at which they sold their products.

There is in this industry no established price for milk. One dairy sells milk for eleven cents, another for eight and one-half cents, another for nine cents, some four quarts for thirty-two cents and so on. Some dairies engaged in price wars, and milk was sold as low as three cents a quart. Many dealers were giving various kinds of discounts to customers, especially to those who bought wholesale.

These prices and various methods of getting customers is due to the sharp competition that exists in the dairy industry. In this way the driver salesmen became the victim of the competitive prices that dealers inaugurated to secure business from their competitors, and the dealers insisted that under the contract they would pay commission on the price of goods sold, no matter how low that price might be.

This resulted in a growing dissatisfaction on the part of the members of the union, and when the contract which was to expire on September 30, 1937 approached the expiration date, the union notified all employers with whom they had a contract that the union would not renew the contract.

The union then appointed a committee of about thirty-five members who drew up a contract, a copy of which was mailed to each employer in the Cleveland area. A copy of that contract is among the exhibits introduced by the plaintiffs. This new contract, among other things, demanded a closed shop—all previous negotiations had been on an open shop basis. It called for limited hours, and pay based on an hourly or weekly rate for the drivers.

As a result of this action on the part of the union a number of the employers met, and this group of employers, which by no means included all the employers in the industry, appointed a committee to meet with the union. This committee had no power to negotiate a contract. It was to meet with the union committee and report back to the employers group what terms the union would accept. (R. page 318.)

The union appointed a committee which was likewise without power to negotiate a contract other than the one that had been mailed by the union to the dealers. The union committee was instructed to enforce the demands made in the contract which had been drawn up by the union committee of thirty-five members, and was further instructed to make no concessions without securing the approval of the rank and file. (R. page 187.) These committees met from early in September until October 5, 1937. Many sessions were held and each session lasted a number of hours.

The principal difficulty between the two groups, and which seemingly was unsurmountable, was the commission method of pay, as advocated by the dealers, and the weekly or hourly method of pay as advanced by the workers. Due to their previous experience with the commission method the union refused to make any concessions, so that the time was spent from the beginning until the last meeting on October 5th principally on this one phase of the contract. The two committees, during that period, had accomplished nothing except perhaps agreement on some inconsequential things.

During the week of October 5th, 1937, the two committees disagreed to such an extent that it was considered futile to hold any further meetings, and on Friday, October 8th, the union voted a strike which was to begin at midnight Monday, October 11.

Both sides prepared for war. The union made every necessary provision to make the strike effective, and the dealers made ready to meet them. A milk strike, unlike other strikes, cannot be localized. Such a strike affects the people generally, and as a consequence the entire community was interested in the position taken by both the employers and the union, but to no avail; the strike seemed to be the only way out.

On Saturday, October 9, and Sunday, October 10, a member of the bar, known to both parties, made an effort to have the two committees resume negotiations so that a strike could be avoided.

As a result, the parties agreed to meet. The union, however, refused to call off the strike and insisted that if the contract was not settled by midnight Monday, October 11, the strike would go on. The two committees met on Monday, October 11, from 2:00 P. M. until 11:00 P. M. At that time it became necessary for the committees to adjourn in order that the committee representing the dealers might consult with a group of dealers for the purpose of securing authority that the committee did not possess, and as a result of this necessary adjournment the deadline for the strike was moved back to the next day.

So greatly interested was the public in what the committee would do on Monday, October 11, that representatives of all the newspapers and an out of town correspondent stood outside the door waiting for the final word, and when the committees adjourned and the statement was made that there would be the usual delivery of milk the next day, all the broadcasting stations of Cleveland broke into the regular programs and made the announcement.

When the meeting was called to order the next day and it was admitted by both sides that nothing of importance had been agreed upon, it was suggested that the committees start again as though no meetings had been held. The member of the bar remained with the group un-

til the final draft was made that was acceptable to the union committee.

The final draft is the contract that is in evidence in this case, and was the result of meetings that took place from October 11, and through the remainder of the month of October and part of November. This draft was not acceptable to the employers' committee, but they were instructed by the union that unless employers accepted this contract the strike would go on as originally planned, so that the employers were face to face again with the legal weapon possessed by labor unions to enforce demands.

The employers' committee reported to the dealers' group the result of the conferences and informed the group that the contract which had been negotiated subsequent to October 11 was the best that could be obtained and that the employers could sign it or not as they choose, but that the committee could do no more. (R. page 318.) The contract was then sent to each dealer in the city with the demand that it be signed. Some dealers signed it at once, others refused to sign it, and others signed it after a time, with reluctance.

#### **A R G U M E N T.**

"It is our conclusion that Section XXV of the contract is not a price-fixing but purely a wage-fixing provision. It is an attempt to standardize the wages at a uniform rate for the drivers, dependent to some extent upon the energy and industry of the individual driver. The Dealer may sell his product for whatever price he chooses without any restriction or limitation imposed by this Section, but the wages are calculated upon a uniform and fixed basis."

#### **Opinion of the Court of Appeals.**

There is no evidence in this record and no evidence can be produced that the Milk Drivers' Union entered into a conspiracy with the dealers, or any dealers, as alleged in the petition.

The transcript of what was said at all the meetings, both those prior to October 11 and those after October 11 has been introduced in evidence. This is the part of the record that petitioners move to dispense with printing. The entire record shows that not only was there sharp disagreement between the negotiators for the union and those for the dealers, but there was present the bitterness, hostility, and emotionalism that is usually present in the meetings involving the subject matter that was under discussion between these two groups. (R. page 927.)

We use the word "contract" in referring to the result of the negotiation between these two groups. The word, however, must not be accepted herein in its literal meaning; rather, this paper-writing establishes a standard that the employers would accept if they employed members of the union.

Among other things the contract provides for a closed shop. The question is raised as to the legality of a closed shop. However, the legality of a closed shop has long ago been established in industry. The principle was recognized many years ago in Ohio in the case of *Local Branch No. 248, et al. vs. Solt*, 8 O. App., 437, wherein the court held, Syllabus 1:

"Where the owner agrees to the exclusive employment of union labor in the construction of a proposed building, and union workmen acting and relying thereon have accepted employment, the subsequent employment of a non-union workman for the execution of a branch of the work is a violation of the owner's agreement, and a mere threatened withdrawal by the union workmen or by the union in their behalf, in the event that the non-union workman is not discharged, is not illegal."

And at page 440:

"The recent cases sustain the validity of contracts made by the employer for the exclusive employment of union labor, particularly where the

supply of union labor is adequate or where provision is made for the unionizing of workmen in case of shortage. *Natl. Fireproofing Co. vs. Mason Builders' Assn.*, 169 Fed. Rep., 260; *Jacobs vs. Cohen*, 183 N. Y., 207; *Mills vs. U. S. Printing Co.*, 99 App. Div. (N. Y.), 605; *Hoban vs. Dempsey*, 217 Mass., 166, and 16 *Ruling Case Law*, 426."

And as to the closed shop violating Anti-Trust Laws, we refer the Court to *Oakes' Organized Labor and Industrial Conflicts*, 237 (Closed Shop Agreements), para. 228:

"It has been held that an agreement between an employers' association and a labor union, whereby the employers' association agrees to employ none but members of the union, and the union agrees that it will give preference to requests made by members of the employers' association for men, over similar requests made by nonmembers, imposes no such direct restraint upon interstate commerce as to render it violative of the Federal Anti-Trust Act; and that a contract between an employer and a labor union that only members of the union shall be employed cannot be regarded as a matter of law, as violating the state Anti-Trust Law." (See *Belfi vs. United States*, (1919; C. C. A. 3d C.) 170 C. C. A. 662, 259 Fed. 882 (obiter). *Goyette vs. C. V. Watson Co.*, (1923) 245 Mass. 577, 140 N. E. 285.)

The only time the principle of closed shop has been questioned in Ohio has been "when it includes an *entire* industry so as to operate generally in the community, preventing workmen from obtaining employment under favorable conditions without joining the union." *Polk vs. The Cleveland Railway Co.*, 20 O. App., 317. *Scaggs vs. Transport Workers Union of America*, cited by the plaintiffs-appellants, is based on the *Polk* case.

The right of persons who are not parties to the making of a closed shop agreement is analyzed in *Oakes'*

*Organized Labor and Industrial Conflicts*, 237 (Closed Shop Agreements) para. 224:

"One employer cannot enjoin other employers from entering into closed shop agreements with a union; and an agreement between employers and a labor union, freely entered into with a view to advancing the respective interests of the parties thereto, that all work of a specified kind shall be given to members of the contracting union whenever such men are available, is not so illegal that performance may be enjoined at the instance of persons not members of the union, although its effect is to diminish their possible employment." (See *Finnegan vs. Butler* (1920) 112 Misc. 280, 182 N. Y. Supp. 671. *Hoban vs. Dempsey* (1914) 217 Mass. 166, L. R. A. 1915A, 1217, 104 N. E. 717, Ann. Cas. 1915C, 810. See also *Meyer vs. Journeymen Stonecutters' Assn.* (1890) 47 N. J. Eq. 519, 20 Atl. 492, holding that the courts will not interfere at the instance either of employers, or of workmen who are not members of a labor union, with the action of such union in resolving not to work with any but members of the union, or for any employer who should insist on their doing so.)

The employers desired to continue the open shop, but had to submit to this demand of the union for the closed shop. The contract provides for a wage rate based upon commission. The employers never receded from their position even in the face of strike in regard to the method by which the driver salesmen should be paid. The demand made in the beginning by the union, that the drivers be paid at an hourly or weekly basis, was overcome by the demand of the employers for the commission method of payment, and which was so disastrous to the union workmen. It was conceded only after the employers agreed to remedy the evils to which the union had been subjected.

Article XXV of the contract requires the employers to pay commission on a fixed rate so that now it makes no difference to the driver salesmen what price the em-

ployer receives for his product, what discounts he gives, what price wars he wages. Members of the union delivering milk are paid the same commission regardless of where they are employed. While this Article fixes the wages for the driver, it in no way can be construed to fix rates which the distributor shall charge for his product. He is free to sell his milk at any price he chooses, to give it away, or to dump it in the gutter. This is not price fixing, it is wage fixing.

The union, in accepting the commission method and waiving their demands for an hourly and weekly wage, insisted that all delivery of dairy products, which in the main means the delivery of the employers' bottled milk, be carried on exclusively by the members of the union. (Article XXXIV.)

The evidence discloses that a number of employers distributed their product in two ways. First, through members of the union; and second, by sale at the platform of their bottled milk to independent distributors, commonly called peddlers or brokers.

The evidence discloses further that these distributors work seven days a week, unlimited hours, employ helpers who are not members of the union, determine their own profits. The bottled milk which they purchase bears the label and the cap of the dairy. They distribute their milk in trucks having the color scheme and bearing the name of the dairy, and in all respects is similar to the trucks from such dairies that are operated by members of the union. There is nothing to distinguish their equipment or the products delivered by them from the equipment and the product delivered by the union driver, except that the peddler's name is printed on the panel of the truck.

These distributors deliver the product on the same streets where the union member is required to sell. Working all days of the week, fixing their own price, employing cheap help, it is not difficult to see why such distribu-

tors have an unfair advantage over the union member who works limited hours, and whose price is fixed by the employer.

Each bottle of milk delivered by the broker from a dairy where a union driver is paid on commission, means to the union member that much less pay. Thus, in line with conceding to the demand of the employer that the union work on a commission rate, the union demanded that they be subjected to no unfair competition such as was represented by delivery through independent distributors.

There is no reason to spend a great deal of time attempting to secure an interpretation of Article XXXIV. Its meaning is plain and never has been denied by the union. If a dealer signs with the union this closed shop contract, the union agrees to work on commission, and the employer agrees to give the union driver the exclusive distribution and sale of his dairy products. If an employer distributes his products in any other way than through the members of the union then he violates the contract. If an employer delivers through brokers he has the choice either to retain that method by refusing to sign the contract, or by eliminating the brokers from the distribution of his bottled milk by signing his contract. Some dealers have chosen to sign the union contract, others have not.

In view of the state of the evidence, it is ridiculous to say that this contract creates a monopoly or that the plaintiffs are prevented from obtaining a supply of milk. The evidence discloses, clearly, that milk is obtainable in any quantity, that there is no restriction on its purchase, or on the equipment necessary to equip or maintain a dairy or a milk route. There is no restriction on pasteurization or bottling of milk, or the machinery necessary for the same. There is no restriction on the purchase of bottles, of caps, boxes, or any other equipment necessary to maintain a route. (R. pp. 620 *et seq.*)

The entire complaint of the plaintiffs is that this contract shuts off the entire source of bottled pasteurized milk to the plaintiffs. This is quite contrary to the proof. Not only is that true which we have said about the ability of plaintiffs to obtain a supply of milk, but the evidence discloses that bottled pasteurized milk is obtainable to the plaintiffs from many sources.

Plaintiffs have not attempted to prove that all the sources of bottled, pasteurized milk are closed to them. They have contented themselves to introduce contracts between the union and *some* employers, but there does not appear in the record anything that will show this Court that *all* sources of supply of bottled, pasteurized milk are closed or could be closed by this contract. The record discloses that the union does not have contracts with the following:

Fairmont Creamery Co.	Filo Dairy
Buckeye Heights Dairy Co.	Suncrest Dairy
Burns Dairy Co.	Woodhill Dairy
Edna Dairy Co.	Avon Dairy
Lyon Dairy Co.	South End Dairy
Rosedale Dairy Co.	Market Square Dairy
Willow Farms Dairy	Sunrise Dairy
Ansel Dairy	Melrose Dairy Co.
Harper Creamery Co.	Bush Dairy
Midland Dairy Co.	Kenmore Dairy
East 66th Street Dairy	Corlett Dairy
Sunny Brook Dairy Co.	Tischler Dairy
Cleveland Pasteurized Milk Co.	Jersey Dairy
Kniesner Dairy Co.	Surgala Dairy
Barth Dairy Co.	Sunshine Dairy
Trejbal Dairy Co.	Jordan Dairies
Richfield Farms, Inc.	Swiss Dairy
Hillcrest Dairy Co.	Lakewood Dairy
Malec and Marek Dairy Co.	Lawn Dairy
Mt. Pleasant Dairy	Ideal Dairy
Balazs Dairy Products	Hridel Dairy
Grand Dairy Co.	Lincoln Heights Dairy
	R. G. Morris Dairy

Race Dairy	Oberlin Farms Dairy
Maple Heights Dairy	West End Dairy
Home Dairy Products	Independence Dairy
Herel Dairy	Manfredi Dairy
Portage Dairy	101 Farms Dairy
West Side Dairy	Miller Dairy Co.
Mound Dairy	

(R. page 905.)

The milk business is open to any one who desires to engage in it, in fact, several witnesses testified that in recent years they started in business from scratch. If a person goes into the milk business and equips a dairy, buys his milk from the farm, pasteurizes it, puts it up under his own labels and in his own bottles, by what authority can he be compelled to distribute his product through any certain agency?

We do not think it is necessary to cite authorities that an owner of dairy products may sell his milk and cream to whomever he chooses or may refrain from selling them to any one he chooses as long as he does not enter into a conspiracy with others.

The best that can be said of plaintiffs' position is that when *some* employers signed this contract with the union, *some* of the sources of bottled, pasteurized milk were closed to the plaintiffs. This is also clear, that the signing of the contract by *some* employers *does not* shut off the source of *all* bottled, pasteurized milk, nor does it shut off the source of *any* unpasteurized milk, or interfere with *any* arrangement that the plaintiffs may enter into to secure milk and have it pasteurized and bottled.

The rule to be applied in this case is not that found in most of the cases cited by the plaintiffs-appellants. A very cursory examination of most of those cases will convince the Court that they have nothing to do with the Anti-Trust Laws, but revolve around strikes, picketing, boycotts, lockouts and industrial disputes between employers and employees.

The guide for business laid down by Ohio Supreme Court, and which applies to the facts and circumstances in this case is found in *List vs. Burley Tobacco Growers' Co-operative Assn.*, 114 Ohio St., 361, Syllabus 4:

"Contracts in restraint of trade are not illegal except when unreasonable in character. When such contracts are incident and ancillary to some lawful business and are not unreasonable in their scope and operation they are not illegal."

Ever since the *List* case has been decided, it has been followed by all the courts of this state, particularly in the following cases:

*Robey et al. vs. The Plain City Theatre Company*, 126 Ohio St., 473, Syllabus 2:

"A contract in restraint of trade, in which the restraint is partial only, reasonable and not oppressive, and in which a valuable consideration has passed between the parties, is one which the law will enforce."

*The Stark County Milk Producers' Assn. vs. Tabe-ling, d.b.a. The Massillon Pure Milk Co.*, 129 Ohio St., 159, Syllabus 2:

"A contract between such an association and a milk dealer or distributor by which the latter agrees to buy all milk for his business from producers who are members of the association, at prices, and to sell under classifications, to be mutually agreed upon by him and the marketing department of the association, and to pay a portion of the proceeds of his sales to the association for the purpose of maintaining a pooling fund and a blended selling price among dealers, with the ultimate purpose of securing to each producer a uniform price for his milk regardless of the price at which it is sold, is not void as against public policy, or in violation of the anti-trust laws of the state of Ohio, unless such contract, in its restraint of trade, is unreasonable as to character, scope or operation (*List vs. Burley Tobacco*

*Growers' Co-operative Assn.*, 114 Ohio St. 361, approved and followed)."

And at page 173:

"The test for determining whether a covenant in restraint of trade is reasonable or not is to consider whether the restraint is no greater than is sufficient to afford a fair protection to the interests of the party for whose benefit it is made and at the same time not so large as to interfere with the interests of the public."

*H. Lipman & Sons, Inc. vs. Brotherhood of Painters, Decorators & Paper Hangers of America*, 30 Abs., 435:

"\* \* \* And the more recent decisions have construed the Sherman Act, as applied to combinations of capital, so as to limit its denunciation to those combinations that unduly restrain trade or commerce. The statute is now construed according to the 'rule of reason' and to prohibit combinations that are intended to directly restrain trade or commerce, or which necessarily have that effect, and excludes combinations for another and lawful purpose which only incidentally and indirectly impose such restraint. Such is the character of the restraint upon trade or commerce of this association of employees."

"In *Standard Oil Co. vs. United States*, 221 U. S. 1, at 66, the court said:

"If the criterion by which it is to be determined in all cases whether every contract, combination, etc., is a restraint of trade within the intendment of the law, is the direct or indirect effect of the acts involved, then of course the rule of reason becomes the guide, and the construction which we have given the statute, instead of being refuted by the cases relied upon, is by those cases demonstrated to be correct. This is true, because as the construction which we have deduced from the history of the Act and the analysis of its text is simply that in every case where it is claimed that an act or acts are in violation of the statute the rule of reason, in the light of the principles of law and the public policy which the act embodies, must be

applied. From this it follows, since that rule and the result of the test as to direct or indirect, in their ultimate aspect, come to one and the same thing, that the difference between the two is therefore only that which obtains between things which do not differ at all.'

"This rule, for the interpretation of anti-trust statutes, was approved and applied to the Valentine Anti-Trust Act in *List vs. Tobacco Growers' Co-operative Assn.*, 114 Ohio St., 361, the 4th paragraph of the syllabus of which is:

" 'Contracts in restraint of trade are not illegal except when unreasonable in character. When such contracts are incident and ancillary to some lawful business and are not unreasonable in their scope and operation they are not illegal.' "

And has also been approved and followed in *Earley vs. Co-operative Pure Milk Association, et al.*, 115 Ohio St., 185, and *Brannan vs. Ohio Poultry Producers' Co-operative Association*, 27 Ohio App., 426; and cited with approval in *Liberty Warehouse Co. vs. Burley Tobacco Co-operative Marketing Association*, 276 U. S., 96; 72 L. Ed., 483, and *Metropolitan Co-operative Milk Producers' Bargaining Agency, Inc. vs. Rock Oil Co-operative, et al.*, 307 U. S., 563; 83 L. Ed., 1464.

We also wish to call the attention of the Court to the following Ohio authorities which justify the contract that is the subject of this action:

27 *Ohio Jurisprudence*, page 162, Sec. 3:

"However, it is not every restraint of trade which the law prohibits, for many transactions which no one questions may be seen to have some effect in reducing competition or affecting prices. In general it is the substantial and direct restraint which is condemned rather than the one which is merely incidental to some lawful transaction."

27 *Ohio Jurisprudence*, page 168, Sec. 9:

"It is conceded that there are contractual rights, with reference to the use of one's property and faculties

which the general assembly is powerless to destroy. So, as to transactions prohibited, the Valentine Act is not to be construed literally, but according to a rule of reason. It is declaratory of the common law, and not to be construed as prohibiting transactions not inimical to the public welfare."

*Wessell vs. Timberlake*, 95 O. S., 21;

*Kissenger vs. Columbus Macadam Co.*, 8 O. N. P., 135.

27 *Ohio Jurisprudence*, page 168, Sec. 9:

"In the interpretation of anti-trust legislation, the trend is toward liberality, and greater tolerance of co-operation in commerce and industry. It has even been said that competition may be reasonable or unreasonable, may promote sane relations between supply and demand, or ruinously place producers at the mercy of consumers and middlemen, the intimation being that the Valentine Act should be construed accordingly."

27 *Ohio Jurisprudence*, page 169, Sec. 10:

"Not every transaction involving some restraint of trade or competition is illegal, for, if such were the case, many transactions which no one questions would be invalid. In general the policy of the law condemns only those transactions which in their effect upon trade, business, or competition are unreasonable; and in any doubtful case, the question, in the last analysis, is one of public policy, to be determined in view of all the circumstances."

27 *Ohio Jurisprudence*, page 172, Sec. 13:

"There seems to be some uncertainty as to the extent to which the rule upholding the validity of reasonable partial restraints imposed upon the sale of a business is applicable to restraints imposed under other circumstances. The doctrine has frequently been referred to as though of general application. Apparently, if the restraint imposed upon one as to his trade or business is ancillary to some lawful transaction, and

reasonable in its limits and effect, it will be upheld; but will not be upheld if it extends beyond the limits of a reasonable adjunct to the main transaction."

*Kevil vs. Standard Oil Co.*, 8 O. N. P. 311, 11 O. D. N. P. 114;

*Huebner-Toledo Breweries Co. vs. Zevnick*, 8 O. N. P. N. S. 193.

Finally, we claim that the plaintiffs have failed to present evidence that authorized the granting of an injunction. In Ohio the rule is announced in the case of *Spangler vs. City of Cleveland*, 43 Ohio St., 526, 3 N. E., 365, as follows:

"1. The burden of establishing a right to a perpetual injunction, claimed by a party to an action, is upon such party.

"2. A court will grant a perpetual injunction only when a party shows a clear right thereto.'"

In the opinion the authorities cited for the above two propositions of the syllabus are the following:

"For a perpetual injunction the courts require that there should be no doubt in the case, and that the plaintiff must make out a clear and unexceptional right.' *Dan. Ch.* 1681.

"The court will not exercise this necessary authority where the right is doubtful or the facts not definitely ascertained.' *Burnham vs. Kempton*, 44 N. H., 92.

"The right must be clear.' *Bonaparte vs. Camden & Amboy R. Co.*, Fed. Cas., No. 1617, 1 Baldw., 218."

Respectfully submitted,

WILLIAM J. CORRIGAN,

*Attorney for Respondent Milk and  
Ice Cream Drivers and Dairy  
Employees' Union, Local 336.*